IN THE

United States Circuit Court of Appeals

FOR THE

Ninth Circuit

TWOHY BROTHERS COMPANY,
a Corporation,
Plaintiff in Error,
vs.
WALTER ROGERS,
Defendant in Error.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

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ARGUMENT

We do not controvert the Statement of the Case as set out in the brief of Plaintiff in Error, but agree that the same is a fair presentation of all matters now in issue before this Court.

Plaintiff in Error has presented Six assignments of error, all and each of which raise the same point and question of law from separate angles and in Six different ways.

The transcript in this cause shows that the original complaint was filed by the Defendant in Error in the Superior Court of Maricopa County, State of Arizona, on the 23rd day of April, 1921, petition for removal filed May 9th, 1921, and that the order of removal was entered on May 14th, 1921, and that the cause went to the United States District Court of Arizona by filing the transcript therein on May 21st, 1921, AND THAT ON THE SAME DAY THE FIRST AMENDED COMPLAINT, NOW ATTACKED, WAS FILED IN THE UNITED STATES DISTRICT COURT, and that the plaintiff in error was not required to and did not file his answer in said cause until the 17th day of June, 1921, twenty-seven days after the filing of said amendment, thus showing that the plaintiff was diligent in asserting his right and certainly not causing the defendant in said cause to suffer any inconvenience or disadvantage.

The question is whether the plaintiff below, after having filed a complaint for negligence at common law involving the same facts, had a right, after a petition for removal was filed, but before time to answer in the Federal Court had expired, to amend by adding an additional count under the Employers Liability Law of Arizona and to later, before the calling of the cause for trial, elect to proceed under the new count; or whether the original filing of the complaint in itself constituted an election precluding a reliance upon the Statutory remedy.

This is the only issue before this court as admitted in the first paragraph of the argument in the brief of plaintiff in error (page 16).

At the outset, it might be well to call the Court's attention to the fact that the Arizona Statute provides an EMPLOYERS LIABILITY LAW, so called, and a COMPULSORY COMPENSATION LAW, and that they have entirely separate contents and were enacted for entirely separate purposes, the former being Chapter VI and the latter Chapter VII of the Revised Statutes of Arizona, 1913.

The former provides for a suit at law for injuries received and the latter provides compensation at a certain rate in case the injured employee ELECTS to accept such compensation.

Counsel for plaintiff in error take all of their vital quotations from the last mentioned compensation Statute. Their quotation set out on the bottom of Page 25 of their brief, to-wit: "Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively," from Paragraph 3176, Chapter VII, which is a part of the compulsory compensation act, they even italicise the same quotation at the bottom of page 29 of their brief. On page 31 of the same brief, and later from a dissenting opinion of Judge Cunningham which is referred to on page 32 of said brief. Counsel have evidently become confused as to the contents and purposes of these two separate and distinct chapters of Arizona law, not

realizing apparently that one chapter provides a remedy by suit at law and the other a settlement out of court.

This action was prosecuted under the *Employers Liability Law* as provided in Chapter VI aforesaid, and we find no provision whatsoever in that chapter as to election and we are therefore compelled to resort to the established rules as to election of remedies to determine whether or not the plaintiff below was precluded from proceeding under the Employers Liability Law by reason of the fact that he had first filed an action at law under the common law for negligence.

Upon the question of the election of remedies, besides citing several times over the Arizona Compensation Statute (Italicised), and a dissenting opinion, counsel has cited thirteen (13) cases from other states. All of these cases cited we have examined and we earnestly submit to the court that not a single one of these cases hold that there is an election by the mere filing of a complaint, but that in each and every one of these cases, the election was based upon a full or partial pursuit of one of the co-ordinate remedies to a final conclusion.

We consider that if under the rulings of the Supreme Court of the State of Arizona an action at common law for negligence and an action under the employers Liability Act can be joined and prosecuted up to the time of the submission to the jury, and the right of election to that time, then the rem-

edies are co-ordinate and one may be substituted for the other.

THE LAW ON THIS POINT AS DECLARED BY THE SUPREME COURT OF THE STATE OF ARIZONA.

The regular practice in Arizona, apparently approved by the Arizona Supreme Court, has been to join an action under the Employers Liability Law, and one for negligence in the same complaint.

In the cause of Arizona Eastern R. R. vs. Matthews, 20 Ariz. 282. These two causes were joined and in the opinion of the Court (page 284) it is set out that at the close of the plaintiff's case in chief the defendant moved the Court to require him to elect whether he would ask a recovery under the Employers Liability Act or under the Common Law. Whereupon, the defendant announced, without any ruling of the Court, his election to recover under the Employers Liability Act. The case then proceeded under the Employers Liability Act, and while no assignment of error seems to have been made, yet the practice was apparently approved.

In the cause of Jerome Verde Copper Company vs. Riley, 21 Ariz. 655, the same joinder of actions was made. The first assignment of error objected to the complaint upon the ground that it joined an action under the Employers Liability Law with an action under the Common Law of Negligence. In this case the Court has apparently approved this practice of joinder of these actions, though the

direct question was evaded by the following statement in the opinion, to-wit:

> "Conceding, for the present purposes, that the appellant's contentions thus made are borne out on the record, yet the minutes of the court disclose that after the plaintiff had submitted his evidence in chief, he moved to dismiss the action as to the Diamond Drilling Company, and the order was granted and said defendant was dismissed. Clearly, the appellant's objections were thereby sustained and the defects of the complaint were cured. We are unable to see in what manner the appellant was prejudiced from the ruling of the court. Its special demurrers were sustained in effect before the trial was finished. The plaintiff was relegated to his common-law remedy, thereby disposing of one cause of action improperly joined, if, in fact, such misjoinder existed."

We take the liberty also of referring to the opinion of the Hon. Wm. H. Sawtelle set out on pages 101 to 103, Transcript of Record, in which he discusses the Arizona rule as to Amendments. The liberal Statute of Arizona as to Amendments referred to in Section 422, Revised Statutes of Arizona, 1913, is as follows:

> "All pleadings or proceedings may upon leave of the court be amended at any stage of the action within such time as the court may

prescribe, or they may be amended before trial without such leave upon serving the adverse party with a copy of such amended pleadings or proceedings."

CONCLUSION.

Counsel for Plaintiff in Error, in presenting this appeal to this Honorable Court, have cited no decision in the State of Arizona which condemns the practice under the Arizona Statute of joining these two actions, or of amending or substituting one for the other, or of electing between the two causes at the time of submission of the cause. They have presented to this Court copious and repeated quotations from the Arizona Compulsory Compensation Act (under which this action has not been prosecuted). Though, in view of the opinions in the two Arizona cases above cited and also the cause of Calumet and Arizona Mining Company vs. Chambers, 20 Ariz. 54 (cited by Judge Wm. H. Sawtelle in his opinion above referred to), the eminent counsel for the Plaintiff in Error must have full knowledge of the Arizona practice of joining these two counts as co-ordinate at any time up to the final submission of the cause, we therefore earnestly submit that the Plaintiff in Error is amenable to those penalties prescribed by Section 3161, Chapter VI, Revised Statutes of Arizona, 1913, being the Act under which this action is prosecuted, and which reads as follows:

Sec. 3161. In all actions for damages brought under the provisions of this Chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then, and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of twelve per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

We therefore earnestly submit that the action of the Arizona District Court should be sustained and judgment directed for the Plaintiff in Error for the full amount of the original judgment and costs, together with interest thereon at the rate of twelve per cent from the date of the original filing of suit until the judgment is paid.

Respectfully submitted,

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